competitive opportunities.[212] GE Americom disagrees that there is a shortage of capacity, noting the recent launching of a new GE Americom satellite.[213]

115. Deutsche Telekom objects to a route market analysis because it would allow the Commission to deny entry if only one of the IGO's route markets is not open.[214] In addition, Deutsche Telekom notes that the route market analysis ignores the fact that many IGO member countries made satellite commitments as a result of the WTO basic telecommunications negotiations.[215] In contrast, Space Communications suggests that the route market analysis would be effective in ensuring INTELSAT does not discriminate in various route markets.[216]

116. With respect to our critical mass proposal, Deutsche Telekom and OrbComm suggest that the critical mass test would not be appropriate because of the difficulty of determining what number of countries constitute a critical mass.[217] The Networks and COMSAT argue that a critical mass of markets has been reached as a result of the WTO basic telecommunications commitments.[218] In contrast, PanAmSat argues that a critical mass has *not* been reached. It further argues that a critical mass test would allow INTELSAT to discriminate in markets in which it has market power and to cross-subsidize its service offerings in markets in which it does not.[219] Space Communications agrees that the critical mass test would enable INTELSAT to discriminate in many markets.[220] AT&T argues that the Commission should examine the openness of all the various route markets served by the IGO.[221] ORBCOMM believes that the Commission should use a combination of both the critical mass test and the effect on competition to determine whether IGO entry is appropriate.

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[212] Columbia FNPRM Reply Comments at 4-5.

[213] GE Americom FNPRM Reply Comments at 8.

[214] Deutsche Telekom FNPRM Reply Comments at 9.

[215] *Id.*

[216] Space Communications FNPRM Reply Comments at 7-8.

[217] Deutsche Telekom FNPRM Reply Comments at 9; OrbComm NPRM Comments at 4-6.

[218] COMSAT FNPRM Comments at 14; Networks FNPRM Reply Comments at 8.

[219] PanAmSat FNPRM Comments at 6-7.

[220] Space Communications FNPRM Reply Comments at 7-8.

[221] AT&T NPRM Comments at 16.

The critical mass analysis would be the initial hurdle, which, if passed, would be followed by an analysis of the effect on competition.[222]

117. Some commenters support the Commission's proposal to evaluate service over an IGO satellite on the basis of whether the service would diminish effective competition in the U.S. market for satellite services.[223] COMSAT states that, if an entry test is necessary, it should be limited to determining whether the proposed service would diminish effective competition in the United States.[224] Loral disapproves of such a test because it represents no improvement from a critical mass test and does not create incentives to open markets.[225] Lockheed Martin, however, favors a test involving whether the entrance of an IGO provides additional market advantages to an entity that has the ability to distort competition.[226] OrbComm supports a combination of the effect on competition and critical mass approaches.[227] AMSC urges the Commission to examine carefully the impact that IGO access to the United States has on the international frequency coordination process and the ability of regional and domestic systems to compete.[228] GE Americom suggests the Commission adopt the proposals in legislation currently pending before Congress.[229]

Discussion

118. As an initial matter, we find unpersuasive suggestions that no standard for review should be established for IGOs until a final decision is made concerning their

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[222] OrbComm NPRM Comments at 4-5.

[223] Motorola FNPRM Comments at 6; INTELSAT NPRM Comments at 7; KDD NPRM Comments at 3. A number of commenters suggest that if an effect on competition test were applied to IGOs, the test would be met, noting that limited Intelsat capacity is available for domestic services. *See* INTELSAT NPRM Reply Comments at 5-7; COMSAT NPRM Reply Comments at 22; CC/Networks NPRM Reply Comments at 8-9; HBO NPRM Comments at 20. In this *Report and Order*, we are establishing the test that a service provider wishing to access an IGO must meet, not whether that test has been met. Thus, these comments are not relevant to the proposals at issue in the current proceeding.

[224] COMSAT FNPRM Comments at 13.

[225] Loral NPRM Reply Comments at 8.

[226] Lockheed Martin NPRM Reply Comments at 15.

[227] OrbComm NPRM Comments at 4-6.

[228] AMSC NPRM Comments at 5.

[229] GE Americom FNPRM Comments at 7. *See* "Communications Satellite Competition and Privatization Act of 1997," H.R. 1872, 105th Cong., 1st Sess. (1997).

privatization.[230] We are not ruling on applications to provide domestic service in this *Report and Order*. Rather, we are establishing the standard that we will use to judge license applications when we receive them. We share the concerns expressed by many commenters about the special advantages accorded IGOs as a result of their treaty-based status. The test that we establish today is designed to take those special advantages into account in determining whether service may be provided through an IGO in the U.S. domestic market. Since COMSAT is currently the sole provider of INTELSAT and Inmarsat capacity in the United States and the U.S. has no obligation to allow access under the WTO Basic Telecom Agreement, the entry standard we set out is limited to applications from COMSAT.

119. We reaffirm our conclusion that we have no WTO obligation to allow the IGOs access to the U.S. market. As an organization created by treaty, an IGO is not a service supplier of a WTO Member and therefore does not derive any benefits from the WTO Basic Telecom Agreement. Thus, we find no merit in COMSAT's argument that we should treat IGOs as if they were service suppliers of a WTO Member.[231] As PanAmSat, AMSC and Orion correctly point out, participants in the WTO basic telecommunications negotiations were unanimous that IGOs were not service suppliers of a WTO Member.[232] Therefore, we agree with AMSC that we have no obligation under the WTO Basic Telecom Agreement to treat IGOs as if they were licensed by WTO Members.[233]

120. We find unconvincing BTNA's argument that the United States has an obligation to provide WTO Member companies direct access to Inmarsat.[234] This argument is premised on BTNA's incorrect conclusion that the U.S. Schedule of Specific Commitments only limits access to INTELSAT and Inmarsat with respect to international service and not U.S. domestic service.[235] The U.S. Schedule of Specific Commitments makes no such distinction; rather it maintains access to INTELSAT and Inmarsat satellites through COMSAT for the provision of *any* service, domestic or international.

121. Although we are free to apply an ECO-Sat test to IGO provision of *domestic* services, we agree with Columbia that there is no reasonable means of applying such a test to

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[230] *See* Columbia NPRM Comments at 22; GE Americom NPRM Comments at 11; Orion NPRM Comments at 15; AT&T NPRM Comments at 14; Lockheed Martin NPRM Reply Comments at 16.

[231] COMSAT FNPRM Comments at 9.

[232] PanAmSat FNPRM Reply Comments at 6; AMSC FNPRM Reply Comments at 10; Orion FNPRM Comments at 7.

[233] AMSC FNPRM Reply Comments at 10.

[234] BTNA FNPRM Comments at 3. *See also* Government of Japan FNPRM Comments at 3.

[235] BTNA FNPRM Comments at 3, n.5. *See also* COMSAT FNPRM Reply Comments at 12.

IGOs. We confirm the conclusion in the *Notice* that the IGOs have no home market.[236] As we stated in the *Notice*, INTELSAT and Inmarsat are headquartered in the United States and United Kingdom, respectively, and the United States and United Kingdom forward these organizations' space station information to the ITU for registration and coordination purposes. However, the highest authority in each organization is national governments. It is unrealistic to treat the United States or the United Kingdom, respectively, as the home market, or to treat any single nation as the home market.[237]

122. We conclude that a route market[238] test will not achieve our objective of promoting competition in the United States or opening foreign satellite markets. In the *Notice*, one of the alternative approaches that the Commission proposed to look at was the openness of all the various route markets served by an IGO -- or at least the markets of its Signatories.[239] This would require us to evaluate whether all of an IGO's Signatories allow U.S. satellite systems to provide domestic services in the Signatories' markets prior to granting COMSAT authority to provide domestic service via that IGO. We find that this sets an unnaturally high barrier because the existence of market barriers in a small number of countries would preclude approval of COMSAT's application. It also does not make sense because many of the smaller Signatories may not have policies in place or a need to establish policies to regulate domestic satellite services.

123. We also conclude that a critical mass test is not appropriate. As we noted in our discussion of critical mass in relation to non-WTO satellite systems,[240] there is the question of what constitutes critical mass and whether it has been reached.[241] Furthermore, the existence of a critical mass depends on the market plans of individual satellite systems and cannot devise a critical mass test that would uniformly apply to all satellite services. Even if we were able to determine what constituted a critical mass, as PanAmSat notes, a critical mass test would not prevent an IGO from engaging in cross-subsidization or otherwise taking advantage of its special status. In addition, we are concerned that applying the critical mass test would not encourage the opening of foreign markets to U.S. satellite services. A

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[236] *Notice* at ¶ 65.

[237] *Id.*

[238] The use of the term "route" market in the IGO context is a misnomer. In effect, the Commission proposed to apply a "home" market test looking at whether IGO Signatories allow U.S. satellite systems to provide domestic satellite services.

[239] *Notice* at ¶ 66.

[240] *See supra* Section III.B.1.b.3.

[241] *Compare* COMSAT FNPRM Comments at 13-14, n.19 and Networks FNPRM Comments at 8 (both arguing that a critical mass had already been achieved) with PanAmSat FNPRM Comments at 6-7 (arguing that critical mass approach is inadequate).

"critical mass" concept implies that all countries need not open their markets. Allowing countries with closed markets to serve the United States because a critical mass of open markets in other countries has been achieved, would provide no incentives for the closed market to open.

124. The fact that there is no appropriate way of applying an ECO-Sat test to IGOs does not mean that we will allow IGOs free access to the U.S. domestic market. We conclude that we will adopt the third alternative proposed in the *Notice* -- an examination of the competitive effect of IGO entry.

125. We agree with Columbia that IGOs have unique characteristics as treaty-based organizations that could enable them to distort competition.[242] Among these characteristics is the immunity INTELSAT and Inmarsat enjoy from suit, including suit under the U.S. antitrust laws. COMSAT, in its role as the U.S. Signatory to INTELSAT and Inmarsat, also benefits from these immunities. We conclude that INTELSAT, Inmarsat, and COMSAT should be subject to the *same rules as their competitors* before COMSAT will be allowed to provide domestic service via INTELSAT or Inmarsat. COMSAT states that it has never claimed immunity as a common carrier and argues that it would enjoy no special advantages over other providers of satellite services in the United States.[243] These arguments, however, overlook the benefits that COMSAT derives in its signatory capacity from the IGOs' immunities. In that capacity, COMSAT participates in business and commercial decisions protected by this immunity.[244] The courts have held that COMSAT, acting in its capacity as U.S. Signatory to INTELSAT and Inmarsat, has immunity from liability under the U.S. antitrust laws.[245] We find that this extension of immunity provides COMSAT a competitive

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[242] Columbia FNPRM Comments at 2.

[243] COMSAT FNPRM Reply Comments at 13.

[244] COMSAT is a member of the INTELSAT Board of Governors and Inmarsat Council and participates in decisions on rates, services, financing, purchase of satellites, development of business plans and other matters normally related to the commercial operation of a satellite system. These decisions provide the basis upon which COMSAT offers service for U.S. customers. These decisions are also made by COMSAT's competitors, but by contrast they are subject to U.S. antitrust laws governing such activities. COMSAT is subject to instruction and guidance from the U.S. Government in its role as U.S. signatory to INTELSAT and Inmarsat. U.S. Government instructions are issued on limited topics involving public policy and national interest issues and normally do not involve purely commercial matters.

[245] *See AlphaLyracom Space Communications, Inc. v. Communications Satellite Corp.* (COMSAT), 1990 WL 135637 at 6-7 (S.D.N.Y. 1990), *aff'd* in part and *rev'd* in part, *AlphaLyracom v. COMSAT*, 946 F.2d 168 (2d Cir. 1991); cert. denied, *AlphaLyracom v. COMSAT*, 502 U.S. 1096 (1992). *See also AlphaLyracom Space Communications, Inc. v. COMSAT*, 1996 WL 897666 (S.D.N.Y.), *aff'd*, *AlphaLyracom v. COMSAT*, 113 F.3rd 372 (2d Cir. 1997). *See also, See-Fone, Limited v. Communications Satellite Corporation*, U.S. Court of Appeals for the Fourth Circuit, No. 96-1672 (unpublished decision, July 8, 1997).

advantage.[246] It allows commercial decisions and activities to be conducted under a cloak of immunity unavailable to COMSAT's competitors. Because of concern over potential harm to the U.S. market for satellite services, we conclude that this is not a situation that we are willing to extend to the U.S. domestic satellite market.

126. As a result, we will require COMSAT to make an appropriate waiver of immunity from any suit as part of its application to provide *domestic* services via INTELSAT or Inmarsat.[247] If COMSAT makes an appropriate waiver,[248] we will look to COMSAT to show that entry into the United States *domestic* market by an INTELSAT or Inmarsat satellite would promote competition and is otherwise in the public interest. Prospective circumstances that could give rise to competition concerns include market concentration, discrimination, and below average variable cost pricing. If there is no other way to address the competitive risks, we may deny the application. If there is a shortage of video transmission capacity, as the Networks argue, we would take this into account in considering whether access to INTELSAT or Inmarsat would distort competition in the U.S. market.

127. We adopt the tentative conclusion in the *Notice* that we will evaluate access requests involving *international* communications over INTELSAT and Inmarsat without applying the ECO-Sat test.[249] Instead, we will treat applications from COMSAT to provide international services via INTELSAT or Inmarsat on a case-by-case basis as we have done in the past. In ruling on these applications, we are fully prepared to address questions about foreign market access or competition issues in the course of an application proceeding.[250] Use of these satellite systems for *international* services is provided for under the Satellite Act, the Maritime Act, and previous Commission authorizations, and is well-established as a matter of practice. As stated in the *Notice*, there are many nations in the world that are connected to the United States only by satellite, and any policy that makes it more difficult to reach these points over INTELSAT would unduly constrain the already limited service to these points. Similarly, Inmarsat remains the only two-way satellite communications system recognized

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[246] *See* United States Government Accounting Office, *Report to the Chairman, Committee on Commerce, House of Representatives, Competitive Impact of Restructuring the International Satellite Organizations*, GAO/RCED-97-1 (Oct. 1996), at 33-4, stating that "immunity from lawsuits may allow the organizations [INTELSAT and Inmarsat] to act in the market in ways that competitors cannot under U.S. antitrust laws."

[247] *See* Merger of MCI Communications Corp. and British Telecommunications plc, FCC 97-302 at 41, n. 135 and at 125 (rel. Sept. 24, 1997).

[248] In order to ensure COMSAT's ability to carry out its signatory responsibilities, we recognize that COMSAT's immunity should be retained when it is carrying out instructions from the U.S. Government.

[249] *Notice* at ¶ 70.

[250] *See* pending COMSAT applications: 1) Application (1-SAT-P-97) for authority to participate in INTELSAT K-TV program; 2) application (CSS-93-009-(1)-A) to participate in INTELSAT program to construct INTELSAT 805 and 806 satellites.

today by the International Maritime Organization as a Global Maritime Distress and Safety System provider, and we believe international services over Inmarsat should remain robust until global maritime and distress and safety services are provided by multiple private systems. For both domestic and international services applications, we will also consider spectrum and other appropriate considerations discussed in Section III.B.2-5.[251]

128. We also conclude that we will not apply an ECO-Sat test to other IGOs, such as Eutelsat or Palapsat, that seek to serve the U.S. market, either for domestic or international services. We agree with Lockheed Martin that the competitive concerns related to INTELSAT and Inmarsat do not apply to these smaller satellite organizations.[252] These entities do not have the same global coverage, market power or breadth of membership as INTELSAT and Inmarsat. As a result, we will presume that entry by these entities is procompetitive. If grant would pose a risk to competition (either through the existence of immunities or other conditions) in the U.S. satellite market, we may impose conditions on the authorization. If conditions would not suffice, we may deny the application.

(3) IGO Affiliates

Background

129. In the *Notice*, the Commission acknowledged that the IGOs were studying various proposals to streamline their organizations to enable them to respond better and faster to competitive pressures.[253] The Commission noted that if the IGOs are to provide services in competitive markets, they cannot be permitted to leverage the benefits of their intergovernmental status to distort competition unfairly. The Commission also recognized that any IGO affiliate may be able to take advantage of these privileges if it were not truly independent. For these reasons, the Commission asked whether affiliates of IGOs should be treated as inter-governmental or private entities.[254]

130. In addition, the Commission proposed to treat IGO affiliate satellites like any other non-U.S. satellite seeking access to the U.S. market, although the Commission proposed to scrutinize, as part of the public interest analysis, the affiliate's independence from any IGO or its Signatories. Thus, in the *Notice*, the Commission proposed to apply an ECO-Sat test, as well as other public interest factors. The Commission stated that any views expressed by

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[251] AMSC urged us to consider the impact that IGO access has on the international frequency coordination process. AMSC NPRM Comments at 5. As we discuss below, spectrum availability and frequency coordination are always considered in our licensing process. The standard for entry will not eliminate these considerations.

[252] Lockheed Martin FNPRM Comments at 8.

[253] *Notice* at ¶¶ 71-74.

[254] *Id.* at ¶ 64.

the Executive Branch regarding the extent to which the affiliate's structure is consistent with U.S. policy would be a prominent part of the analysis.[255] Finally, the Commission proposed to apply this standard of review to any request to transfer existing IGO licenses to an affiliate and to new services via an affiliate.[256]

131. In light of the WTO Basic Telecom Agreement, in the *Further Notice*, the Commission proposed that IGO affiliate satellites from WTO Members would be accorded the same treatment as any satellite system of a WTO Member.[257] Therefore, the Commission proposed not to apply an ECO-Sat test to IGO affiliate satellites licensed by a WTO Member.[258] The Commission reiterated its concern, however, that the unique relationship between an IGO and its affiliate could pose a very high risk to competition in satellite services to, from and within the United States. The Commission noted that in the WTO Basic Telecom Agreement, the United States had preserved its ability to protect competition in the U.S. market, including the possibility of not granting market access to a future IGO affiliate satellite.[259] In support of this position, the Commission cited the U.S. Trade Representative's statement that the United States has no obligation to permit market access to a future privatized affiliate, subsidiary, or other IGO spinoff that would likely lead to anticompetitive results.[260] As a result, the Commission proposed *not* to apply an ECO-Sat test to IGO affiliate satellites of WTO member countries, but to review the affiliate's relationship to its IGO parent to ensure that grant would not pose a very high risk to competition in the U.S. satellite market, through, for example, collusive behavior, cross-subsidization, denial of

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[255] *Id.* at ¶ 73.

[256] *Id.* at ¶ 74.

[257] *Further Notice* at ¶ 34.

[258] *Id.* at ¶ 35.

[259] *Id.*

[260] *Id. See* Letter from Charlene Barshefsky, U.S. Trade Representative Designate to Ken Gross, President and Chief Operating Officer, Columbia Communications (Feb. 12, 1997) (USTR Letter), stating in part:

> We have also concluded that the United States cannot be forced to grant a license to a privatized inter-governmental satellite organization (ISO) (should the ISO change its treaty status and incorporate in a country) or to a future privatized affiliate, subsidiary or other form of spin-off from the ISO. Existing U.S. communications and antitrust law, regulation, policy and practice will continue to apply to license applicants if [the WTO Basic Telecom Agreement] goes into effect. Both Department of Justice and FCC precedent evidence long-standing concerns about competition in the U.S. market and actions to protect that competition. We have made it clear to all our negotiating partners in the WTO that the United States will not grant market access to a future privatized affiliate, subsidiary or other form of spin-off from the ISOs, that would likely lead to anticompetitive results.

market access, and directly or indirectly benefitting from IGO privileges and immunities.[261] Finally, the Commission noted that this test would apply to evaluation of requests to use satellites of future IGO affiliates.

Position of the Parties

132. A number of commenters agree that IGO affiliate satellites should be treated the same as other non-U.S. satellites.[262] USTR states that application of the ECO-SAT test should be governed by whether the licensing authority is a WTO Member.[263] Deutsche Telekom argues that the Commission has to grant the same rights and privileges to IGO affiliates licensed by WTO Members as it does to other satellite systems licensed by WTO Members.[264] COMSAT states that the competitive review envisioned for all non-U.S. satellites should be sufficient to detect any affiliate relationships or structures that pose a risk to competition.[265] It argues that any further inquiry would set a bad precedent for other countries.[266] Lockheed Martin agrees, stating that the Commission would need to consider any potential anticompetitive or market distorting consequences of a continued relationship between an IGO and its affiliate.[267] France Telecom states that if an entry test is necessary, any conditions should be narrowly crafted so as to avoid hampering the ability of the affiliate to compete fairly and effectively. Furthermore, direct or indirect government ownership of an IGO affiliate should not prevent it from obtaining a license.[268]

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[261] *Further Notice* at ¶ 36.

[262] Lockheed Martin FNPRM Comments at 8; Deutsche Telekom FNPRM Reply Comments at 10; COMSAT FNPRM Comments at 19; European Commission FNPRM Reply Comments at 4.

[263] USTR FNPRM Reply Comments at 6-7.

[264] Deutsche Telekom FNPRM Reply Comments at 10. Loral stated that IGO affiliates were not entitled to benefit under the WTO agreement. Loral FNPRM Comments at 12. This statement is inaccurate. If an IGO affiliate is a "service supplier" of a WTO Member, it is entitled to the benefits of the WTO Basic Telecom Agreement.

[265] COMSAT FNPRM Reply Comments at 17.

[266] COMSAT FNPRM Comments at 19-20.

[267] Lockheed Martin FNPRM Comments at 8.

[268] France Telecom FNPRM Reply Comments at 4.

133. Others argue that IGO affiliate satellites should be subject to more rigorous scrutiny than other satellite systems from WTO Members.[269] Orion argues that the Commission must aggressively police IGO affiliate satellites to ensure that only *bona fide* independent affiliates are permitted into the U.S. market.[270] Orion urges us to adopt a broad definition of affiliates, not limited to those entities under common ownership or control, and asks us to look at any preferential contractual arrangements between an IGO affiliate and IGO signatory administrations that would enable it to act in an anticompetitive manner.[271] PanAmSat notes that it is appropriate and necessary to inquire whether the affiliate could pose a significant risk to competition and whether the affiliate is structured to prevent practices such as collusive behavior, cross-subsidization and denial of market access.[272] Space Communications supports the Commission's decision to review the affiliate's relationship to its IGO parent and suggests that the Commission consider structural factors that could lead to collusive behavior, cross-subsidies and the denial of market access.[273] TRW agrees with the Commission's assessment of the inherent risk to competition posed by IGO affiliates in the U.S. marketplace.[274] Loral argues that, because of their ownership interest, IGO signatories will give IGO affiliates preferential treatment over other private systems. Loral also notes that IGO signatory ownership may make it easier for IGO affiliates to raise capital.[275] Columbia argues that the streamlined WTO model should apply only to entities that have an entirely separate investment structure and no special treaty privileges. If any vestigial IGO entity remains, Columbia argues, the Commission should review those ties.[276]

134. A number of commenters cite the letter from U.S. Trade Representative Barshefsky, quoted above, for the proposition that we should closely scrutinize IGO affiliates.[277] Indeed, Columbia contends that the letter supports the proposition that an IGO

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[269] TRW FNPRM Comments at 6; GE Americom FNPRM Comments at 6; PanAmSat FNPRM Comments at 7; Orion FNPRM Comments at 8; Columbia FNPRM Comments at 3; Space Communications FNPRM Comments at 9. *See also* Loral FNPRM Comments at 6 (although Loral urges the Commission to seek further comment to develop rules and standards under which an IGO affiliate may serve the U.S. market).

[270] Orion FNPRM Comments at 11.

[271] *Id.* at note 21.

[272] PanAmSat FNPRM Comments at 7-8.

[273] Space Communications FNPRM Reply Comments at 9.

[274] TRW FNPRM Comments at 4.

[275] Loral FNPRM Comments at 8.

[276] Columbia FNPRM Comments at 3.

[277] *See, e.g.*, Columbia FNPRM Comments at 4; Orion FNPRM Comments at 10-11.

affiliate has to be totally devoid of IGO ownership to qualify for entry.[278] COMSAT argues that the USTR's letter does not establish a separate standard for IGO affiliates. Rather, according to COMSAT, the letter states that IGO affiliates will be treated the same as all other applicants -- and that this scrutiny should detect any anticompetitive relationships between the IGOs and their affiliates.[279]

135. Comments are divided as to whether ICO should be treated as an IGO affiliate, subject to greater scrutiny when it applies for a license, or as any other WTO satellite system.[280] Some commenters see no rational basis for distinguishing between an existing and future IGO affiliate.[281] Hughes notes that ICO had not been considered as a future IGO affiliate during the basic telecom negotiations and should not be treated as one now.[282]

Discussion

136. We affirm the tentative conclusion in the *Further Notice* that we should treat IGO affiliate satellites[283] licensed by WTO Members like other satellites licensed by WTO Members. Thus, for services covered by U.S. commitments under the WTO Basic Telecom Agreement, we will apply the presumption in favor of entry to an IGO affiliate licensed by a WTO Member. We reserve the right, however, to attach conditions to the grant of authority or, in the exceptional case in which an application would pose a very high risk to competition in the U.S. satellite market, to deny the application. In determining whether an application to serve the U.S. market by an IGO affiliate raises the potential for competitive harm, we will consider any potential anticompetitive or market distorting consequences of continued relationships or connections between an IGO and its affiliate. For example, we will look at whether the affiliate is structured to prevent practices such as collusive behavior or cross-subsidization, the degree of affiliation between the IGO and its affiliate, and whether the affiliate can directly or indirectly benefit from IGO privileges and immunities. We will also consider the ownership structure of the affiliate, the effect of IGO and other Signatory ownership, and the existence of clearly defined arms-length conditions governing the affiliate-IGO relationship. We anticipate that arms-length conditions would include separate officers,

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[278] Columbia FNPRM Comments at 4.

[279] COMSAT FNPRM Reply Comments at 17.

[280] Loral FNPRM Comments at 13-17; TRW FNPRM Comments at 4-7; Hughes FNPRM Comments at 10, Reply Comments at 5-6; ICO NPRM Comments at 42-44, FNPRM Comments at 15-16, Reply Comments at 16; COMSAT FNPRM Comments at 19.

[281] TRW FNPRM Comments at 4; Loral FNPRM Comments at 14.

[282] Hughes FNPRM Reply Comments at 5-6.

[283] For the purpose of this *Report and Order*, an IGO affiliate is an entity created by an IGO, in which an IGO and IGO signatories maintain ownership interests. ICO falls within our definition of an IGO affiliate.

directors, employees, and accounting systems, and fair market valuing for permissible business transactions between an IGO and its affiliate that is verifiable by an independent audit and consistent with normal commercial practice. There should be no common marketing or recourse to IGO assets for credit or capital. It is also essential that an IGO not register or coordinate spectrum or orbital locations on behalf of its affiliate.

137. We recognize that the creation of IGO affiliates will result from international negotiation among INTELSAT or Inmarsat members. Our competition review will reflect any arrangements agreed to by the United States as a result of such negotiations. As we stated in the *Notice*, due to the role of the Executive Branch in the negotiation of the creation of any IGO affiliate, we will take into account views expressed by the Executive Branch on the competitive nature of requests for IGO affiliate entry as part of our public interest analysis.

138. We will apply the ECO-Sat test as described above to IGO affiliate satellites from non-WTO countries. Similarly, we will treat an IGO affiliate's provision of DTH, DBS and DARS in the same manner as other non-U.S. satellites systems providing those services. IGO affiliates also will be subject to the same spectrum availability considerations, licensing, and operating requirements, and other public interest factors discussed below.

e. Bilateral Agreements

Background

139. In the *Further Notice*, the Commission recognized that to continue our goal of enhancing competition in the global satellite market, the United States may enter bilateral agreements with individual countries for the provision of satellite services.[284] Indeed, the United States recently completed a bilateral agreement with Mexico for DTH-FSS and DBS service, services which are not covered under the WTO Basic Telecom Agreement.[285] The Commission noted that it expects any such agreements to benefit U.S. operators by providing them with market access to a country on a national treatment basis.[286]

140. The Commission proposed to evaluate applications based on bilateral satellite services agreements in the same manner that we proposed to treat applications to access

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[284] *Further Notice* at ¶ 29.

[285] Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception of Signals from Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States, April 26, 1996. Protocol Concerning the Transmission and Reception of Signals from Satellites for the Provision of Direct-to-Home Satellite Services in the United States of America and the United Mexican States, November 8, 1996.

[286] *Further Notice* at ¶ 29.

satellites licensed by WTO Members for the provision of covered services.[287] Specifically, the Commission proposed not to apply the ECO-Sat test to these applications, but to evaluate such applications under a presumption that entry will promote competition unless an opposing party demonstrates a very high risk to competition in the United States satellite market that could not be addressed by conditions on the license. The Commission sought comment on this proposal.

Positions of the Parties

141. The commenters support our proposal.[288] They claim that an ECO-Sat test would be "redundant" because the purpose of a bilateral agreement is to enhance competition by permitting foreign-licensed satellites to offer new services to U.S. consumers, and opening foreign markets to U.S.-licensed satellites.

142. Some parties make recommendations about how we should execute bilateral agreements. Orion suggests that we conduct bilaterals as expeditiously as possible and that we not halt service while negotiations are underway. It recommends that, rather than freezing earth station applications involving services under discussion, we grant special temporary authority for foreign systems to operate in the United States.[289] GE Americom urges us to retain authority to monitor competitive conditions and compliance with the terms of a bilateral agreement, as well as the power to revoke or condition authorizations as necessary to address competitive concerns.[290] PanAmSat suggests that, if a bilateral agreement governs two or more satellite services, the Commission should retain authority to deny access to operators

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[287] *Id.* at ¶ 30.

[288] GE Americom FNPRM Comments at 4-5; GE Americom FNPRM Reply Comments at 2-3; Hughes FNPRM Comments at 15-16; Hughes FNPRM Reply Comments at 6-7; Orion FNPRM Comments at 7 n.13; PanAmSat FNPRM Comments at 8 n.16; Qualcomm FNPRM Comments at 6-7. In addition, the European Commission reiterates its position that DTH-FSS, DBS, and DARS effectively are covered under the WTO Agreement, and thus, should not be subject to an ECO-Sat test. European Commission FNPRM Reply Comments at 2-3. We note that despite our overall treatment of DTH-FSS, DBS, and DARS as non-covered WTO services, our treatment of those services in the context of bilateral agreements will achieve the result the European Commission seeks -- a presumption in favor of entry of enhanced competition, and no application of the ECO-Sat test.

[289] Orion FNPRM Comments at 7. Orion claims, for example, that the Commission's freeze on earth station applications to communicate with the Mexican Telecom system during the six-month negotiation period between the United States and Mexico on an FSS protocol, affected the ability of Orion and other U.S. licensee to obtain licenses for services they wanted to provide via the Telecom system. *Id.*

[290] GE Americom FNPRM Comments at 4-5.

licensed by the foreign country for all such services if U.S. licensees subsequently are denied access regarding the provision of any of the services covered under the bilateral agreement.[291]

Discussion

143. We adopt our proposal to review applications to access a satellite licensed in a foreign country with which the United States has an existing bilateral agreement involving the particular type of satellite service to be provided based on a presumption that entry will promote competition. In such cases, the bilateral agreement would itself grant U.S. companies the right to enter a foreign country's market for that particular satellite service market and afl ords various other rights and protections concerning the delivery of service in that market. In essence, a bilateral agreement acts as a gateway to, and a guarantee of, increased competition in the two countries at both ends of the agreement. Thus, we find that in these situations, there is no need to conduct an inquiry into the effective competitive opportunities in the other country's market.

144. Consistent with the framework we adopt today for satellites licensed by WTO Members, where we also rely on a presumption of enhanced competition, opposing parties will have the opportunity to demonstrate, and we may determine on our own motion, that grant of the application would cause competitive harm to the U.S. satellite market. In addition, the application will be subject to other public interest requirements, and must comply with Commission technical and service rules, as discussed below.

145. We have noted the suggestions about how we should conduct bilateral negotiations. Expeditious action to advance competition in satellite services and development of global systems for the benefit of United States consumers is a paramount Commission goal. This objective will continue to be part of our approach as we enter bilateral discussions. Commenters such as PanAmSat and GE Americom can be assured that we will retain authority to monitor competitive conditions and compliance with the terms of a bilateral agreement, as well as our authority to revoke or condition authorizations as necessary to address any competitive concerns that might develop. In addition, we will not adopt a rule requiring us to take action on pending earth stations during bilateral discussions, as Orion suggests. Rather, we will make an assessment of the best way to proceed based on the circumstances at the time.

2. Spectrum Availability

146. In both the *Notice* and *Further Notice*, the Commission proposed that it would consider other public interest factors. These factors include, for example, spectrum

[291] PanAmSat FNPRM Comments at 8 n.16. For example, according to PanAmSat, if a bilateral agreement covered both FSS and DTH and the non-U.S. party subsequently denied U.S. operators access to its market for FSS services, the U.S. could deny both DTH and FSS services to operators licensed by the non-U.S. party.

availability, foreign ownership, legal, technical, and financial qualifications, operating requirements, and national security, foreign policy and law enforcement and trade policy concerns.[292] We first discuss spectrum availability.

147. In the *Notice* and *Further Notice*, the Commission stated that spectrum availability constraints often impact the satellite licensing process.[293] For example, the Commission often receives more applications for proposed satellites than it can accommodate in the spectrum available for a specific service. The Commission noted that in such cases it would not be able to accommodate all proposed non-U.S. satellites any more than it could accommodate all proposed U.S. satellites. Similarly, the Commission noted that where it already has licensed the maximum number of satellites that can be accommodated in a particular frequency band, we would not be able to offer opportunities for new entrants, including non-U.S. satellite systems. Further, it stated that it did not expect to require existing U.S. satellite systems to change their licensed operating parameters or to decrease their capacity in order to accommodate additional non-U.S. systems.

148. Commenters generally agree with our proposal to consider spectrum availability in determining whether to grant a non-U.S. satellite access to the U.S. market.[294] COMSAT asks that any decisions based on spectrum availability be reasonable and objective in order to preclude the appearance of protectionist or discriminatory treatment.[295]

149. We adopt our proposal to consider spectrum availability as a factor in determining whether allowing a foreign satellite to serve the United States is in the public interest. We envision that issues of spectrum availability may arise regardless of whether the foreign operator seeks to use a proposed or existing non-U.S. satellite to serve the United States. First, a foreign operator may choose to participate in a U.S. space station processing round, a vehicle by which we concurrently consider all requests to implement satellites in the same frequency bands. Given the scarcity of available orbit and spectrum resources, it often is not possible to issue licenses to all entities that participate in a processing round. This situation undoubtedly will intensify as foreign satellites enter the market. We emphasize that the rules and policies we adopt in any subsequent processing round will apply to both U.S. and non-U.S. applicants. We agree with COMSAT that these procedures should be transparent and nondiscriminatory. As a result, however, we may be forced to deny a pending application, whether relating to a U.S. licensed or non-U.S. licensed space station, or to otherwise deny a request to serve the United States through a foreign satellite.

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[292] *Notice* at ¶ 48; *Further Notice* at ¶ 37.

[293] *Notice* at ¶ 50; *Further Notice* at ¶ 38.

[294] AMSC FNPRM Comments at 4-6; Loral FNPRM Comments at 21; COMSAT FNPRM Reply Comments at 18.

[295] COMSAT FNPRM Reply Comments at 18.

150. Further, spectrum considerations may arise in cases where the foreign service provider seeks access to the U.S. market by filing an earth station application to access an operating non-U.S. satellite. In these cases, we must determine whether, and to what extent, the proposed U.S. service will impact existing operations in the United States. We believe that, in the majority of cases, non-U.S. satellites meeting Commission technical requirements will be able to be coordinated to operate compatibly with U.S.-licensed systems. Nevertheless, there may be exceptional cases where grant would create debilitating interference problems or where the only technical solution would require U.S.-licensed systems to significantly alter their operations.[296] In these cases, we would impose technical constraints on the foreign system's operations in the United States or, in cases where any such measures would be insufficient to remedy the technical problem, deny the request. We consider the same factors in acting on similar requests from U.S. applicants.[297]

3. Eligibility Requirements

a. Foreign Ownership

151. In the *Further Notice*, the Commission recognized that, as a result of the explosive growth of global satellite networks generally and open entry policies under the WTO Basic Telecom Agreement, there likely will be an increase in foreign investment in satellite facilities that serve the United States. Consequently, foreign ownership issues may arise. Section 310(b)(4) of the Communications Act authorizes the Commission to allow up to 100 percent indirect foreign ownership in common carriers. To the extent that Section 310 applies to an application for an earth station license to serve the United States as a common carrier, we will apply the rules established in our concurrent *Foreign Participation Order*.[298] As discussed fully in that *Order*,[299] we find that easing foreign investment in U.S. common carrier wireless markets will serve the public interest. Therefore, we adopt a rebuttable presumption that applications by investors from WTO Member countries to exceed the 25 percent foreign ownership limitation under Section 310(b)(4) will promote competition.

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[296] *Further Notice* at ¶ 38.

[297] *See, e.g.*, GE American Communications, Inc., 3 FCC Rcd 6871 (1988) (denying GE's request to operate a high powered satellite at an orbital location from which it would cause unacceptable interference to adjacent U.S. satellites).

[298] *See Foreign Participation Order*, Section III.D.

[299] *Id.*

b. Legal, Financial, and Technical Qualifications

Background

152. In the *Notice* and *Further Notice*, the Commission proposed to require foreign-licensed satellites to comply with all Commission qualification requirements for the particular satellite service involved before we would grant them access into the U.S. market. It did so to promote the efficient use of the scarce and valuable orbit/spectrum resource to the ultimate benefit of U.S. consumers.[300]

Positions of the Parties

153. Most commenters support our proposal to require foreign operators to meet the same qualification criteria we impose on U.S. applicants.[301] PanAmSat asserts that this is necessary "to ensure fair and effective competition," while Orion observes that waiving obligations for non-U.S. satellites would create an incentive for U.S. entities to circumvent Commission rules by obtaining licenses from other countries.[302] In contrast, ICO, Columbia, and Lockheed Martin urge that where a foreign operator has received a license from another administration and international coordination has been completed, further Commission review is unnecessary because the operator already has demonstrated to a regulatory body that it is qualified to hold a license.[303] Hughes states that applying any U.S. qualification requirements to non-U.S. operators that go beyond technical compatibility could deter foreign entry and deprive U.S. consumers of the benefits of added competition.[304] It further argues that, if adopted, our proposed qualification requirements could cause other countries to adopt similar duplicative requirements or impose retaliatory space station licensing or other burdensome requirements on U.S. licensed satellite operators seeking to provide service in foreign markets.[305]

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[300] *Notice* at ¶¶ 17 and 54-56; *Further Notice* at ¶¶ 37-46, 50, and 53.

[301] *See* GE Americom FNPRM Comments at 9; Motorola FNPRM Comments at 6-7. *See, e.g.*, AMSC FNPRM Reply Comments at 8-9; Loral FNPRM Comments at 23-24; Orion FNPRM Comments at 14; UTC FNPRM Comments at 2; Winstar FNPRM Comments at 1-2.

[302] PanAmSat FNPRM Comments at 8; Orion FNPRM Reply Comments at 5 n.12.

[303] ICO FNPRM Comments at 10-11; Columbia FNPRM Comments at 7-8; Lockheed Martin FNPRM Reply Comments at 3.

[304] Hughes FNPRM Reply Comments at 9-10.

[305] *Id.*

Discussion

154. Through numerous rulemakings intended to authorize innovative commercial satellite services, the Commission has developed various qualification requirements that are designed to maximize the number of competitive systems available to customers while ensuring spectrum efficiency.[306] To this end, we require U.S. satellite applicants to demonstrate their legal, financial, and technical qualifications to hold a license before we will grant such applications. Given the differences in the technical, spectrum, and sharing characteristics in different satellite services (*e.g.*, Big LEO as compared to Little LEO systems), the Commission has adopted qualification requirements that differ somewhat from service to service.

155. In adopting a framework under which to consider U.S. market access by non-U.S. satellites, we recognize the importance of proceeding cautiously before restricting or conditioning entry by foreign operators. We proceeded cautiously when we adopted and refined our rules for *domestic* entry. From the beginning, our "Open Skies" policy was designed to allow the maximum number of U.S. satellites to operate with maximum flexibility in the United States.[307] This policy, however, did not mean that U.S. entry into the domestic satellite market was unlimited. Our entry standards necessarily balanced our goal of promoting competition with the recognition that the orbit and frequency spectrum was a limited and valuable resource.[308] We designed technical requirements to accommodate the maximum number of systems in orbit and to ensure that a proposed system would be compatible with ongoing and future operations in a particular frequency band; we adopted financial requirements to ensure that orbit and spectrum resources are used efficiently, not wasted, by requiring applicants to demonstrate that they are fully capitalized and financially able to implement systems; and we imposed legal requirements to ensure that licenses are not awarded to entities previously found to have violated U.S. laws or Commission rules.

156. We conclude that it is necessary to apply these same considerations to requests to serve the United States using foreign-licensed satellites. First, technical requirements must be met because allowing a foreign-licensed satellite to provide service into the United States may cause unacceptable interference with U.S. systems and possible service disruptions to

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[306] *See, e.g., Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, 9 FCC Rcd 5936 (1994) (adopting rules to accommodate five Big LEO systems, requiring each to be capable of serving the United States at all times); *Licensing of Space Stations in the Domestic Fixed-Satellite Service*, 54 Rad. Reg. (P&F) 577 (1983) (reducing orbital spacings between U.S. satellites to 2 degrees and adopting more stringent technical requirements to permit closer spacings).

[307] *Domestic Communications Satellite Facilities*, 22 FCC 2d 86 (1970) (Domsat I).

[308] *See Domestic Communications Satellite Facilities*, 35 FCC 2d 844 (1972) (Domsat II).

customers. Other countries have not adopted the same spectrum-maximizing technical requirements that we have imposed, such as two degree orbital spacing between geostationary orbit satellites, power limitations, and stringent out-of-band emission limits. Thus, it is necessary to examine a non-U.S. satellite's compliance with Commission technical requirements prior to granting a request to serve the United States.

157. Second, we must apply our financial rules to all systems serving the United States, including those involving non-U.S. space stations. The Commission's financial requirements, established under Section 308(b) of the Communications Act,[309] are based on our repeated experience that undercapitalized companies have difficulty raising the hundreds of millions of dollars needed to finance a satellite system, even after receiving a Commission license. Historically, such companies have tied up valuable orbit resources for years while attempting, often unsuccessfully, to build their proposed systems -- to the exclusion of other financially qualified entities. Reserving orbit locations or spectrum for future non-U.S. satellites without examining whether the operator is financially qualified to build the system could block entry by other U.S. or foreign companies that have the financial capability to proceed, ultimately delaying service to the public. It is therefore necessary to continue to apply our financial qualification rules to any entity seeking to serve the United States.

158. Third, consistent with the Commission's public interest responsibilities under Sections 308 and 309, we impose legal qualifications to U.S. licensees.[310] One of the purposes of our legal requirements is to ensure that entities providing satellite services in the United States will abide by Commission rules. This is especially important for satellite services, where the costs and value of a system are high, and technical coordination and interference concerns are paramount. We realize that there is no guarantee that an entity will comply with our rules, but find that certain information may provide relevant indicia of compliance. For example, violations of law by an applicant, particularly those relating to credibility, may be evidence that it will not comply with Commission rules.[311] Thus, it is vital that the Commission obtain assurance that an applicant will follow the rules that we have established over the years to maximize the development of efficient, compatible, and innovative satellite systems in the public interest.

159. Consequently, we conclude that when considering a request for authority to use a non-U.S. space station to serve the U.S. market, we must apply the same qualification criteria with respect to the foreign space station as we do for a U.S. licensed space station.

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[309] 47 U.S.C. § 308(b).

[310] 47 U.S.C. §§ 308(b), 309. Section 308(b), for example, permits us to consider character and citizenship qualifications.

[311] *See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1195-97, 1200-03 (1986), *modified*, 5 FCC Rcd 3252, 3252 (1990); *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n.14 (1988).

We find that requiring prospective foreign entrants to meet the same qualification requirements we apply to U.S. applicants is consistent with our MFN and national treatment obligations under the GATS. If this policy causes other countries to adopt licensing requirements for U.S. satellite operators seeking to provide service in that country, as Hughes suggests, we find it on balance to be a minimal burden when compared to the possibility that unrestricted entry by foreign-licensed satellite systems would vitiate our orbit efficiency policies. Indeed, we do not expect other countries' licensing requirements to be a burden in most instances. Most of our largest trading partners are WTO-member countries, where U.S. operators must receive national treatment.

4. Operating Requirements

160. As described above, in the *Notice* and *Further Notice*, the Commission proposed that, once operational, a non-U.S. satellite system serving the United States -- whether licensed by a WTO member or not -- would be subject to the same on-going requirements that apply to U.S. satellites. We address certain specific rules below.

a. Prohibition Against Exclusive Arrangements

Background

161. In the *Further Notice*, the Commission proposed to apply to the prohibition against exclusive service arrangements applicable to U.S. satellite operators providing international services to non-U.S. licensed satellite operators as well.[312] An exclusive arrangement generally would take the form of an agreement between a space station operator or service provider that establishes a particular satellite as the only permissible facility by which to offer a particular satellite service between the United States and the foreign country. The prohibition was intended to facilitate global competition by furthering the use of multiple satellite systems in other countries and to ensure that all U.S. licenses have an opportunity to provide truly global service. The Commission stated that it intended to construe this prohibition bearing in mind that spectrum coordination and availability in particular countries may limit the number of systems that can provide service to that country.

162. In the *Further Notice*, the Commission proffered two alternative approaches to applying this restriction to foreign satellite operators. First, under the narrow approach, the Commission suggested that it could condition any authority for the foreign system to serve the United States on the foreign satellite not providing service between the United States and any specific country with which such satellite already has entered into an exclusive arrangement.[313] Under the broader approach, the Commission suggested that it could subject

[312] *Further Notice* at ¶¶ 41-42.

[313] *Id.*

an authorization to the general condition that the licensee may not serve the U.S. market at all if it maintains exclusive arrangements with *any country*.[314]

Positions of the Parties

163. Most commenters generally support conditioning grant of any authorization to serve the United States through the use of a non-U.S. satellite on the prohibition against exclusive arrangements.[315] Columbia additionally supports license revocation for violation of the condition.[316] PanAmSat specifically asserts that *all* foreign systems serving the U.S. market -- including those from WTO and non-WTO countries and for covered and uncovered services -- must be subject to the prohibition against maintaining an exclusive relationship with *any* foreign country.[317] It claims that the ability of a non-U.S. system to serve some routes closed to U.S. systems will disadvantage U.S. systems on all routes.[318] Orion notes, however, that the Commission may lack the authority to condition licenses involving WTO member satellites, absent a showing that the exclusive arrangement will create a very high risk to competition in the U.S. market. Orion suggests, therefore, that we may be able to condition authorizations regarding non-WTO satellites.[319]

164. On the other hand, TMI opposes our proposal to extend the prohibition on exclusive arrangements to non-U.S. satellites. TMI contends that the proposal is unworkable, unreasonably vague, inconsistent with the Commission's policies for telecommunications carriers, and would violate MFN and national treatment because most U.S. satellite licensees, including AMSC, are not subject to such a rule.[320] TMI also submits that in most cases access to non-U.S. satellites will be triggered by a user request through an earth station application.[321] It states that such users usually will have no knowledge of the satellite operator's non-U.S. business practices, and that it would be unrealistic to hold an earth station

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[314] *Further Notice* at ¶ 43.

[315] Columbia FNPRM Comments at 5; PanAmSat FNPRM Comments at 8-9; PanAmSat FNPRM Reply Comments at 3; Motorola FNPRM Comments at 4 and n.7.

[316] Columbia FNPRM Comments at 5.

[317] PanAmSat FNPRM Comments at 8-9; PanAmSat FNPRM Reply Comments at 3.

[318] PanAmSat FNPRM Comments at 8-9.

[319] Orion FNPRM Comments at 14-15.

[320] TMI FNPRM Supplemental Comments at 8-11; Space Communications FNPRM Reply Comments at 5 (citing *Further Notice* at ¶ 42).

[321] TMI FNPRM Supplemental Comments at 9 n.18.

operator responsible for compliance with this limitation.[322] Space Communications claims that a prohibition against exclusive arrangements -- even if such arrangements do not adversely affect market access for U.S. competitors -- is unnecessarily broad and not likely to foster innovation or competition.[323]

165. TMI, in addition, claims that our alternative proposal to impose a broad condition prohibiting the non-U.S. provider from serving the U.S. market at all if it maintains exclusive arrangements with *any* country "would plainly negate the United States' WTO schedule of market opening commitments," and would violate the MFN and national treatment provisions of the GATS.[324] Instead, TMI recommends that we review, on a case-by-case basis the anticompetitive impact, if any, of an exclusive arrangement entered into by a non-U.S. satellite operator. TMI contends that our policies barring anticompetitive practices, together with our complaint procedures, provide sufficient regulatory safeguards to deter arrangements that may substantially impair competition for U.S. satellite services.[325]

Discussion

166. The goal of our exclusive arrangement prohibition is to maximize fair and effective competition. TMI correctly notes that certain U.S. satellite operators, including AMSC, are not subject to this license condition. The more recently licensed satellite operators are, however, subject to this prohibition, including Big LEO and 28 GHz licensees.[326] Further, the Commission recently adopted service rules in the second processing round for the Little LEO service prohibiting exclusive arrangements.[327] To continue to advance these procompetitive objectives, we expect to apply this prohibition to future U.S.

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[322] *Id.*

[323] Space Communications FNPRM Reply Comments at 5.

[324] TMI FNPRM Supplemental Comments at 8 n.16 (citing *Further Notice* at ¶ 43).

[325] TMI FNPRM Supplemental Comments at 11. *See* AirTouch FNPRM Comments at 4 (asserting that if a non-U.S. licensed MSS provider seeks to serve a non-WTO market (as well as the U.S. market), the Commission can address any competition concerns by applying the same rules to those entities that it applies to U.S. licensed systems, citing the prohibition on exclusive arrangements).

[326] *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Band*, 11 FCC Rcd 12861 (1996), 61 FR 9944 (March 12, 1996) (Big LEO Recon); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Bands, to Reallocate the 29.5-30.0 GHz Frequency Bands, to Establish Rules and Policies for local Multipoint Distribution Services and for Fixed Satellite Services*, FCC 97-378 (released October 15, 1997), 62 FR 61448 (November 18, 1997) (Ka-Band Service Rules).

[327] *Amendment of Part 25 of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service*, FCC 97-370 (released October 15, 1997), 62 FR 59293 (November 3, 1997) (*Second Round Little LEO Report and Order*).

licensees. Similarly, we will apply the prohibition to non-U.S. operators as we grant them access to the U.S. market. We will therefore attach a condition to entry into the U.S. market that prohibits a foreign operator from providing any service between the United States and *any country* with which such satellite has an exclusive arrangement. We will not, however, adopt the alternative proposal prohibiting *any* service in the United States if the foreign operator has *one* such agreement. Such a broad condition would go beyond our defined goal of protecting effective competition in the United States.

167. Thus, we will prohibit a non-U.S. satellite operator from providing service between the United States and any country in which it has entered into an exclusive agreement to provide satellite capacity for a particular service. This approach is consistent with our national treatment and MFN obligations under the GATS because we will be treating non-U.S. satellites the same as U.S. satellites, and will treat all non-U.S. satellites similarly. Finally, in response to TMI's claim that this would be inconsistent with the Commission's policies for international telecommunications carriers, we note that our approach here is based on spectrum, competitive and other characteristics unique to the satellite environment.

b. Other Service Rules

Background

168. In the *Notice* and *Further Notice*, the Commission proposed to hold foreign entrants to all other service rules imposed on U.S. licensees. The Commission raised, as an example, the rule that requires Big LEO licensees to be capable of providing continuous service in the United States.[328] The Commission proposed to extend this to all non-U.S. Big LEO operators as well. The commenters raised the applicability of four other service rules, which we discuss below.[329]

Positions of the Parties

169. Loral and UTC contend that we should extend to non-U.S. licensed systems operating within the United States the Commission rule on relocating microwave operators from the 2 GHz frequency band.[330] They claim that if non-U.S. satellites were exempt, they would be unjustly enriched by receiving the benefit of access to cleared spectrum without sharing the financial burden imposed on U.S. licensees, which would distort competition in

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[328] 47 CFR § 25.143(b)(2)(iii).

[329] *Further Notice* at ¶¶ 39-44.

[330] Loral FNPRM Comments at 24 (citing *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, FCC 97-93 (released March 14, 1997); UTC FNPRM Comments at 3.

the United States.[331] Hughes, by contrast, advises that the Commission should proceed cautiously in imposing obligations on foreign licensees such as paying for relocation costs of incumbent licensees.[332]

170. Second, some parties ask us to extend the universal service requirements recently adopted for U.S. satellite operators to non-U.S. satellite operators providing domestic service.[333] Loral states that the *Universal Service Report and Order* exempts from universal service contributions foreign satellite operators that provide international service only, that is, foreign operators that provide satellite service between the United States and another country but do not provide any domestic interstate service.[334] It adds that the *Order* appears to impose contribution obligations on U.S. licensed service providers (including Loral Skynet) that provide international *and* domestic interstate satellite services -- a result it contends is "patently unfair" and inconsistent with national treatment.[335] Loral recommends that the Commission ensure that our rules do not arbitrarily advantage entities that provide satellite services to or from the United States but that do not provide domestic, interstate satellite services. GE Americom favors parity with respect to universal service contributions, asserting that any disparate treatment between U.S. and non-U.S. providers would harm competition in the U.S. satellite services market.[336]

171. Third, AMSC asserts that non-U.S. systems operating in the "L-band" frequencies should be required to comply with requirements for provision of priority and preemptive access to safety services, and for the provision of relay services for persons with hearing and speech disabilities.[337]

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[331] Loral FNPRM Comments at 24; UTC FNPRM Comments at 3. UTC submits that utilities depend on reliable and secure communications to assist them in carrying out their public service obligations and many operate private networks in the 2 GHz band. According to UTC, any relocation of incumbent licensees in that band should not impair incumbents operationally or financially. *Id.*

[332] Hughes FNPRM Reply Comments at 10, n.26.

[333] *Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, FCC 97-157 (released May 8, 1997) (*Universal Service Report and Order*). *See, e.g.*, AMSC FNPRM Reply Comments at 9; Loral FNPRM Comments at 27; GE Americom FNPRM Comments at 11, n.2; GE Americom FNPRM Reply Comments at 9; Orion FNPRM Reply Comments at 5.

[334] Loral FNPRM Comments at 27 and n.50 (*citing Universal Service Report and Order* at ¶ 779). In reply comments, GE Americom states that "fees and contribution requirements must be equitably assessed against all satellite operators serving the U.S. market," but does not specifically assert support for universal service contributions. GE Americom FNPRM Reply Comments at 9.

[335] Loral FNPRM Comments at 27.

[336] GE Americom FNPRM Comments at 11-12 and n.2.

[337] AMSC FNPRM Reply Comments at 9.

172. Fourth, some parties suggest that non-U.S. satellite providers be required to pay the regulatory fees associated with holding a space station license as a means of paying their fair measure of the costs of Commission activities.[338] They argue that, because the Commission will not be issuing space station licenses to foreign operators, these operators will be exempt from paying this fee, which would afford foreign operators an unfair competitive advantage in the United States.[339] Loral argues that the Communications Act gives the Commission authority to amend the regulatory fee schedule when there are changes in law (here, the WTO Basic Telecom Agreement), and recommends that we do so for FY 1998.[340] PanAmSat argues that equitable and nondiscriminatory application of regulatory fees and costs is required to comply with the Unite States' national treatment obligations under the GATS and will create a level competitive playing field.[341] Lockheed Martin concurs that non-U.S. licensed satellite operators should pay fees to cover the costs of Commission activities, but argues that the Commission does not coordinate foreign satellite systems internationally. Consequently, it argues that non-U.S. operators should not be required to pay that portion of the annual fees associated with international coordination activities.[342]

Discussion

173. In general, we will require non-U.S. satellite operators to comply with all Commission rules applicable to U.S. satellite operators. To do otherwise would place U.S. and foreign operators on an uneven competitive footing when providing identical satellite services in the United States and would defeat our public policy objectives in adopting these service rules in the first place. We will consider requests for waivers of any rules, by foreign or domestic providers, on a case-by-case basis. We find that this overall approach does not violate U.S. national treatment obligations because we will be treating foreign service suppliers identically to U.S. service suppliers with respect to their provision of service *within* the United States. As to the parties' specific recommendations, we agree with Loral and UTC that we should require satellite systems operating in the 2 GHz band in the United States to bear a proportionate share of the terrestrial relocation costs; and with AMSC that foreign

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[338] *See, e.g.*, AMSC FNPRM Reply Comments at 9; GE Americom FNPRM Comments at 11; GE Americom FNPRM Reply Comments at 9; Orion FNPRM Reply Comments at 5; PanAmSat FNPRM Reply Comments at 3. PanAmSat recommends that regulatory and application fees applicable to non-U.S. licensed systems be adjusted based on the amount of Commission resources required to authorize access to those systems. PanAmSat FNPRM Reply Comments at 3.

[339] GE Americom FNPRM Comments at 11; Loral FNPRM Comments at 24, 25 and n.46 (citing 47 CFR § 1.1156).

[340] Loral FNPRM Comments at 26-27.

[341] PanAmSat FNPRM Reply Comments at 3.

[342] Lockheed Martin FNPRM Reply Comments at 4-5.